Supreme Court, U.S.
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NO:

IN THE
SUPREME COURT OF THE UNITED STATES

TERM OF OCTOBER, 1997

OFFICER R. E. WILLIAMS AND THE CITY OF ERIE POLICE DEPARTMENT

PETITIONERS

V.

DARRYL BYRD

RESPONDENT

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit, Nos. 96-3306 and 96-3633; judgment entered February 13, 1998, and reconsideration denied March 31, 1998

PETITION FOR WRIT OF CERTIORARI

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52 pp

QUESTIONS PRESENTED FOR REVIEW

Did the Circuit Court below err in reversing the District Court's grant of Petitioner's Motion for Judgment on the Pleadings, under *Heck v. Humphrey*, given that the subject Respondent's gunshot injury to his foot resulted from a fight with a police officer who was attempting to apprehend Respondent for violent felony and misdemeanor offenses of which he was ultimately and finally convicted, including Resisting Arrest; particularly as the Respondent admits he is attacking the validity of his convictions in this Civil Rights action?

Does the Respondent's complaint name a proper municipal body as a defendant, and properly allege liability for the delay of his medical treatment against any municipal policymaker?

LISTING OF PARTIES

All parties in the Third Circuit below are listed in the case caption, although Petitioner continues to dispute the designation of "Erie Police Department" as a party, rather than the municipality itself, but neither court below specifically ruled on this question.

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BASIS OF SUPREME COURT JURISDICTION

The opinion and judgment of the Third Circuit panel was entered February 13, 1998. Respondent himself petitioned for rehearing as to the dismissal of some of his counts, which was denied March 31, 1998. This court's jurisdiction is prescribed by 28 U.S.C.S. §1254(1), enacted June 25, 1948.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The action was filed pursuant to 42 U.S.C.S. §1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in

> an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Respondent Darryl Byrd (hereinafter "Byrd") claims to have been a victim of the use of excessive force by a municipal police officer during an arrest, as determined by reference to the Fourth Amendment to the Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

This action was filed in the Western District of Pennsylvania, Erie Division, at No. 93-CV-152 on April 30, 1993 by Byrd, *pro se* from his prison confinement at the State Correctional Institution at Rockview, Pennsylvania. Jurisdiction existed in that court under 28 U.S.C.S. §1331 as a federal question, with venue

defined by 28 U.S.C.S. §1391(b), as the claim arose within the City of Erie, Pennsylvania. Byrd sought and received *in forma pauperis* status, and ultimately served process February 15, 1994. A Motion to Dismiss under Rule 12(b)(6) was filed by Petitioner March 7, 1994, which resulted in the filing of an Amended Complaint.

Byrd alleges that, on November 25, 1992, he was subjected to excessive force by Petitioner, Officer R. E. Williams of the City of Erie Police. Williams shot Byrd in the foot before arresting him as a suspect in a burglary which had taken place shortly before this encounter. Byrd also claims some amount of beating after the arrest, as well as a delay in being taken for emergency room treatment of his foot wound while he was processed in the police station.

On May 20, 1993, a jury in the Erie County Court of Common Pleas convicted Byrd of burglary, unlawful restraint, theft, terroristic threats, reckless endangerment, aggravated assault and resisting arrest, all arising from his actions on the night of his arrest. According to the official records of the criminal case, in the early morning hours of November 25, 1992, Byrd broke into an apartment, tied up the female occupant, ransacked her belongings, and threatened her with harm. As police arrived at the front door and announced themselves, he broke a window to exit onto the street. During his flight, Byrd came upon Petitioner, R.E. Williams, an on-duty

police officer in plain clothes who had responded to a radio call from the police dispatcher regarding the burglary. Byrd refused to submit to arrest, and in fact fought with Officer Williams, punching him in the head while trying to take his police revolver from him. Byrd broke free, and began to run away from Williams, who, after determining the necessity of force, fired a shot at the lower region of Byrd's body at a distance of twenty to twenty-five feet, hitting him near the ankle of one foot. This slowed Byrd's movement slightly but sufficiently to permit apprehension by Williams and other officers arriving on the scene. Byrd's conviction has twice been affirmed by the Superior Court of Pennsylvania. At this time, no collateral attack on the convictions has drawn them into any doubt. Petitioner answered Byrd's Amended Complaint, raising the affirmative defense of the appropriateness of the force used, and subsequently filed a Motion for Judgment on the Pleadings under Fed. R. Civ. P. 12(c). Magistrate Judge Susan Paradise Baxter's recommendation to grant the Motion on August 24, 1995, was adopted by Judge Maurice B. Cohill on September 28, 1995, who dismissed the case entirely and closed the record.

Byrd subsequently filed Objections to the Magistrate's Recommendation and Report and, twelve days after Judge Cohill's order, filed a Motion for Stay of Judgment. Six months later, on April 16, 1996, Judge Cohill granted the stay, but in the same order confirmed the previous order dismissing Byrd's case. Byrd then

appealed to the Third Circuit, which docketed the appeal at No. 96-3306. He also filed in the District Court a Motion for Relief From Judgment on April 18, 1996, which Judge Cohill denied October 10, 1996. Byrd then appealed from that denial to the Third Circuit, which docketed it at No. 96-3633, and the court later consolidated both appeals.

Petitioner did attack the timeliness of these appeals, asserting that nothing filed by Byrd after the September 28, 1995, Order dismissing his case properly tolled the 30-day appeal period. The Third Circuit ruled in Byrd's favor, and also reversed part of the District Court's dismissal of the action, allowing Byrd to go forward on his claims of excessive force as to the gunshot and the allegation of unreasonable delay of medical treatment.

REASONS FOR GRANTING THE WRIT

I. Certiorari should be granted because the Third Circuit appears to be deciding an important question of federal law in a manner contrary to the decisions of this court.

This case involves an application of this court's decision in *Heck v. Humphrey*, 512 U.S. 477, 1114 S.Ct. 2364, 129 L.Ed. 2d 383 (1994), which established the principle that the Civil Rights Act, specifically 42 U.S.C. §1983, may not be utilized by a person convicted of a crime as a collateral civil attack upon the conviction, when the conviction has not

been reversed or otherwise called into question at the time the civil action is filed. The ruling of the Third Circuit in the present case essentially disregards *Heck* by finding it inapplicable to a manifestly obvious example of the type of collateral civil attack which *Heck* intended to halt.

The Circuit Court's opinion correctly states that the mere conviction of a charge of Resisting Arrest under Pennsylvania law, 18 Pa.C.S.A. §5104, which establishes that the defendant "created a substantial risk of bodily injury to the public servant or anyone else, or employs means justifying or requiring substantial force to overcome the resistance" does not preclude a convict from alleging that the force used on him exceeded the proper "substantial" level to that deemed excessive under the Fourth Amendment, as is the standard set by *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865, 104 L.Ed 2d 443 (1989). The Court, however, went on to declare that its own ruling in *Nelson v. Jashurek*, 106 F.3d 142 (1997), controlled this case. *Nelson* involved a section 1983 complaint against a police officer by a person convicted only of resisting arrest, and the Circuit determined that an allegation that the force used was excessive under the circumstances should reach a jury. As will be argued more fully below, the present set of circumstances is materially different from *Nelson* as a matter of law.

Byrd's pleadings admit, both, that he did receive hospital treatment the same

day for his foot wound and that he continues to dispute nearly every factual and legal basis of his conviction. The Third Circuit, nevertheless, allowed Byrd a chance to attack his convictions by litigating his section 1983 claims of excessive force and unreasonable delay in treatment.

In *Heck*, this Court provided an example of the type of section 1983 action which does not seek damages directly attributable to conviction or confinement but whose successful prosecution would necessarily imply that the plaintiff's conviction was wrongful. As cited by the Magistrate Judge's opinion, that example involves a plaintiff convicted of resisting arrest who then brings suit claiming violation of his Fourth Amendment right to be free from unreasonable seizures (*Heck*, n. 6, 114 S. Ct. at 2372). The present litigation, of course, fits squarely within this example of a proscribed use of Section 1983.

This petitioner does not suggest that a person convicted of resisting arrest under Pennsylvania law could never bring an excessive force claim under any circumstances; as there indeed might be situations in which the police response to resistance is grossly disproportionate. We state only that such actions, to have any validity, must allege facts far more egregious than those Byrd has alleged; taking into account, as required, all of the circumstances facing the defendant

police officer[1].

In *Crooms v. Mercado, No. 41* 995 F. Supp. 985 (N.D. Ill 1997), the court applied *Heck* to dismiss a section 1983 action arising from a domestic disturbance from which the plaintiff was convicted of resisting arrest, on the basis that, because the plaintiff told a version of his encounter with the police officer which denied the aggressive action of which the jury had convicted him, a civil verdict in his favor would necessarily negate a central element of the criminal offense, as the police officer's version was obviously accepted by the criminal jury. That court also acknowledged the theoretical possibility that a person properly convicted of resisting arrest might still have been the victim of excessive force under the Fourth Amendment, but that the plaintiff in that case could not be permitted a collateral civil jury trial to impeach the version of events already determined against him in a final criminal conviction.

In the present case, Byrd denies his attack upon Officer Williams, and indeed any criminal responsibility whatsoever.

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[1] *Graham v. Connor*, *supra*, 490 U.S. 386 at 396, requires the consideration of "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officer or others, or whether he is actively resisting arrest or attempting to evade arrest by flight."

He makes numerous attacks on several elements of the sequence of events presented at his criminal trial and accepted by the jury which found him to have committed multiple violent crimes, all prior to his shooting and apprehension. Byrd was sentenced and resentenced after remand to at least 11 years in prison because of these facts as well as his history of similar violent criminality, for which he accepts no responsibility. He has spent the last five years filing one civil action after another against all those who took any part in his arrest, trial and conviction; all of which are replete with his denial of guilt.

Under such circumstances, with the record of his convictions and unsuccessful appeals readily available, and actually the subject of a reported decision of the Pennsylvania Superior Court, the petitioner's Motion to Dismiss under Rule 12(c) was the most efficient and appropriate method to address the legal insufficiency of Byrd's action. The Complaint and Amended Complaint readily admit the fact of the convictions, and the Answer and Defenses simply make further reference to the convictions. The District Court properly confined itself to the pleadings filed, as any additional factual rendition of Byrd's admitted convictions could be gleaned from, or referenced in *Commonwealth v. Byrd*, 657 A.2d 961 (Pa. Super 1995). Byrd's convictions resulting from the November 25, 1992, arrest are undeniable public judicial records, and do not need to be

presented in the manner of depositions, affidavits, documents or other factual material to be considered as part of a determination of a Motion for Judgment on the Pleadings without converting it to a Motion for Summary Judgment under Rule 56. Most of the allegations of Byrd's Complaint and amended complaint are entirely at odds with his convictions. At every stage of the proceedings below, including his Petition for Rehearing to the Third Circuit, he attaches copies of transcripts or correspondence which he deems supportive of his contention that a miscarriage of justice caused his conviction. It is clear that the effort to attack his convictions is the true driving force of Byrd's litigation, not the minor injury and delay of medical treatment he alleges as excessive force.

The brevity of discussion by the Third Circuit panel in reinstating the excessive force and unreasonable delay claims indicates that the Third Circuit sees the viability of excessive force suits under section 1983 by persons convicted of resisting arrest as the *rule* rather than the *exception* contemplated by this Court's ruling in ***Heck***. Indeed, if Darryl Byrd's violent crime spree, including an aggravated assault upon a police officer and flight to avoid apprehension for violent felonies does not prohibit him from claiming his minor arrest injuries as Fourth Amendment violations, then the Third Circuit has dispensed, for most purposes, not only with ***Heck***, but with the primary holding of *Graham v. Connor*, *supra*, which provides

that the issue of the reasonability of the use of force be determined from the perspective of the officer on the scene.

The central focus of *Heck* and *Graham* in dealing with allegations of excessive force during lawful arrests is to recognize the motivation of many convicts to utilize the court system to litigate trivial matters, or to harass those who were responsible for bringing them to justice; and that this sometimes takes the form of a suit for excessive force during or after the arrest. The allegations of the convict's complaint in such a section 1983 action must be placed in their proper context, rather than being permitted in all instances to go to trial under the theory that some criminals who resist arrest indeed are also victims of excessive force by the arresting officers. The Third Circuit, in citing its own decision of *Nelson v. Jashurek*, *supra*, as controlling law regarding the excessive force claim of Byrd displays either an inability or a refusal to distinguish two vastly different events. In *Nelson*, the plaintiff was the subject of an arrest warrant for some type of parole violation; not specified in the opinion, but apparently of insignificant criminality or public danger. Jashurek, a police officer, recognized Nelson, told him he was under arrest, and, after Nelson ran away, caught him and placed him under arrest after a struggle. Nelson, charged and convicted only of resisting arrest, filed suit claiming excessive force by Jashurek under section 1983. The District Court's summary judgment of dismissal

under *Heck* was reversed by the Third Circuit on the basis that a jury could find that the force used by Jashurek was excessive rather than just "substantial."

The Byrd scenario is, of course, drastically different. Officer Williams and the other police were pursuing an unknown suspect who had just committed a nighttime apartment burglary, tied up and threatened the occupant before breaking through the window to run from the police. As determined by the criminal court jury, Byrd attacked Williams, trying to take his police revolver and punching him in the head, again running away, and being caught only after Williams' well-aimed gunshot to Byrd's foot slowed him down. Byrd's complaint denies virtually all of this, and portrays the gunshot as Williams' first action towards him, and himself as wrongfully convicted at trial. If the set of facts determined by the criminal court jury is to be given its proper conclusive presumption of truth, Byrd's account cannot be true, and the appropriateness of Williams' use of non-deadly force must be accepted as a matter of law, lest the entire jurisprudence in this area of law be invalidated.

Perhaps the clearest and most recent proof of Byrd's true intention to relitigate his conviction is his Motion for Reconsideration to the Third Circuit. Unsatisfied with the reinstatement of his claims for excessive force and unreasonable delay of medical treatment, he persists in seeking relief on his theory of intentional use of perjured

testimony; a matter thoroughly outside the scope of section 1983 in the context of an unreversed conviction. He refuses even to admit that his convictions have been substantively affirmed in the state court, and that the resentencing remands have not in any way, shape or form called his convictions into question, but instead argues peripheral issues every time he has filed a document with the courts below.

The totality of the circumstances as well as the prevailing emphasis by Byrd of the alleged wrongfulness of his convictions establishes the manifest error of the Third Circuit's additional reinstatement of Byrd's count alleging "prolonged delay" of medical treatment. While it is surely proper that the courts zealously protect persons held in police custody from deliberate indifference to serious medical needs, it is quite obvious from Byrd's allegations and arguments that the delay of treatment during his processing at the police station was trivial, not just as a matter of civil rights law, but in fact to Byrd himself. He admits that he was taken to the hospital the same morning of his arrest; and identifies no damages flowing from the custodial delay itself, as opposed to the existence of the gunshot wound.

The Circuit Court focusing on Byrd's assertion of a "prolonged interrogation" preceding his transportation to the hospital from the police station found that allegation sufficient, for purposes of resisting a Motion to Dismiss, of the requisite "deliberate indifference to

serious medical needs" which a pretrial detainee must demonstrate to prevail under section 1983: *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861 (1979), citing *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285 (1976). In doing so, the Court both elevated Byrd's allegation above similar claims found insufficient within the same Circuit, and made the more serious error of disregarding Byrd's failure to sue the person or persons he accuses of causing the delay of his treatment!

In *Brawley v. Philadelphia Sheriff's Department, et al*, 872 F.2d 411 (1989), the Circuit let stand, without published opinion, the Eastern District of Pennsylvania's dismissal on summary judgment of such a "deliberate indifference" claim (No. 87-6725, slip op. Dec. 22, 1998), which determined that a twelve-hour wait for treatment of a detainee's knee damaged in a prison bus accident was not a constitutional violation. The District Court's opinion cited *Hampton v. Holmesburg Prison Officials*, 546 F.2d 1077 (3d Cir. 1976), *Monmouth County Correctional Institutional Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987) and other cases, holding that the failure to provide prompt medical care alone is not tantamount to a violation of the constitution, and that even with a serious medical condition, the delay must be deliberate and also cause discernible long-term effects itself. Byrd has pled no damages caused by delay alone.

The Eastern District of Pennsylvania again applied these principles in *Duvall*

et al v. Borough of Oxford et al, Civ. Action No. 90-0629, 1192 U.S. Dist. LEXIS 3630, in granting in part a Motion to Dismiss under Rule 12(b)(6). The plaintiff's claim for deliberate indifference to his medical needs resulted from being beaten and slammed into his cell, after which he was heard to be complaining of severe pain. Because the complaint itself admitted that Duvall was taken to the hospital the same day of his arrest, the Court dismissed this count. In the present case, Byrd's complaint also admits his same-day treatment at the hospital.

II. Certiorari should be granted because of the lower court's failure or refusal to recognize that Byrd did not sue those he accused of some of his damages, and this Court needs to clarify the pleading standards as to individual municipal officer defendants.

Even if the gunshot wound to Byrd's foot constituted such a serious medical need that, as a matter of law, no interrogation should have taken place until after immediate medical attention, the *Duvall* opinion also dealt with an aspect of that case which should prove fatal to Byrd's "deliberate indifference" claim. The Court in that case addressed first the improper inclusion of the Oxford Police Department and the Chester County Prison as defendants; dismissing them because they have no separate corporate existence from the Borough of Oxford and Chester County, respectively; citing *Baldi*

v. Philadelphia, 609 F. Supp. 162 (E.D. Pa. 1985). This doctrine, that such departments or governmental sub-units are not "persons" suable under section 1983, is well-established, if not always honored, throughout the nation[2]. Both in the Circuit and in the District Court below, Petitioner raised the argument that Byrd had sued only "Erie Police Department and R. E. Williams, Police Officer" and not the City of Erie itself or a policymaking official. The Magistrate Judge specifically declined to reach the issue, as it was moot with her dismissal. The Circuit failed to deal with the issue at all, though Petitioner briefed it.

The import of Byrd's failure to sue the City of Erie, or to include any policy-making officials in his suit, is that he has failed to sue anyone whom he alleges to be responsible for the decision to delay his medical treatment! He clearly identifies Officer Williams only as the person who shot him in the foot and testified against him, but just as clearly describes in his complaint his transport and detention by other officers, with Williams no longer having control of his transportation and detention. He has, therefore, not stated any recognizable claim for the deliberate indifference to his medical needs. Such a claim requires

[2] Martin A. Schwartz and John E. Kirklin, Section 1983 Litigation Claims and Defenses Third Edition, John Wiley and Sons, Publishers, ISBN 0-471-11761-7, Sec. 5.2, notes 43-44.

at least the proper inclusion of the City of Erie as a defendant, even under the liberal federal pleading standards applicable as to section 1983 municipal defendants under *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 113 S.Ct. 1160, 122 L.Ed 2d 517 (1993).

Leatherman, of course, rejected any heightened pleading standard in section 1983 actions as to municipal entity defendants, but left explicitly undecided the issue of whether the availability of qualified immunity as a defense for individual governmental officers would support a requirement to plead section 1983 claims with more specificity than generally required under Fed. R. Civ. P. 8. The various decisions of the lower federal courts have differed significantly about the effect of *Leatherman* on claims against individual defendants: *Section 1983 Litigation, Claims and Defenses supra*, 1.6, note 129; 9.33, note 954.

The present case is as good an opportunity as any for this Court to settle the issue left undecided by *Leatherman*. The Complaint and Amended Complaint filed by Byrd clearly have failed to sue a proper municipal defendant, and have identified only an individual officer who is not alleged to have been responsible for deliberate indifference to Byrd's medical needs after the arrest. If such a delay of medical treatment giving rise to a claim of deliberate indifference did take place, the only responsible parties would be

those individuals acting under color of law, and not entitled to immunity. Byrd has named none of them. Even if he had properly sued the City of Erie, rather than its non-suable Police Department, he would have no basis to impose municipal liability unless a policymaking official took a specific unconstitutional action against him, or if the non-policymakers acted pursuant to municipal policy, custom or practice. This cannot be established, or even alleged, by vague, general assertions against persons not even alleged to have policymaking power. The requirements for a proper allegation of municipal liability for a single constitutional deprivation by a policymaker, as set forth by this court in *Monell v. New York City Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed. 2d 611 (1978) and *Pembaur v. Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed. 2d 452 (1986); or an allegation of municipal liability because of a deliberate indifference or failure to train, determined in *Canton v. Harris*, 498 U.S. 378, 109 S.Ct. 1197, 103 L.Ed. 2d 412 (1989) and *Board of County Commissioners of Bryan County, Oklahoma v. Brown*, 117 S. Ct. 1382, (1997), are not remotely complied with in this matter, even allowing a certain indulgence to *pro se* prisoner pleadings.

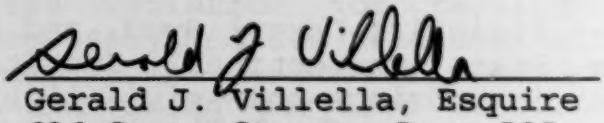
The Third Circuit, as well as some other Circuits, apparently require additional direction from this Court regarding such matters as the use of section 1983 by convicts for collateral civil attacks upon their convictions.

Furthermore, there are many plaintiffs who appear to believe that municipalities, or even municipal sub-units, can generally be held liable for any allegedly unconstitutional actions taken by any of their employees at any level with the barest and most conclusory allegations set forth in a complaint. This Court has said otherwise in the recent past, and is entitled to have its rulings adhered to by the lower tribunals. The nation is entitled to have section 1983 of the Civil Rights Act preserved as a proper vehicle for redress of serious wrongs, and not be further abused.

CONCLUSION

Petitioner request that a Writ of Certiorari be issued to the Third Circuit Court of Appeals, requiring the reinstatement of the District Court's dismissal of the action.

Respectfully Submitted,



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Dated: June 25, 1998

APPENDIX A -- MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION DATED AUGUST 24, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DARRYL BYRD,	:	
Plaintiff	:	
	:	
v.	:	
	:	
ERIE CITY POLICE	:	Civil Action
DEPARTMENT,	:	No. 93-152
Defendants	:	Erie

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I.
RECOMMENDATION

It is recommended that Defendants' Motion for Judgment on the Pleadings be granted.

II.
REPORT

Plaintiff Darryl Byrd, and inmate at the State Correctional Institution at Rockview, brings this civil rights action against the Erie Police Department and Officer R. E. Williams. Plaintiff claims that he was returning from the grocery store on November 25, 1992, when he was shot from behind in the leg by Defendant Williams. Fearing for his life, Plaintiff claims that he ran from the scene, but was quickly apprehended by the police, beaten by Defendant Williams and other police officers, and arrested. He also claims

that he was deprived necessary medical treatment for his injuries.

Defendants, on the other hand, claim that Plaintiff was identified by the victim and another witness as having just run from the scene of a burglary and attempted rape. Officer Williams, responding to a radio call describing Byrd as a possible suspect, encountered Plaintiff and the two men struggled. Plaintiff was able to get free, so Defendant Williams shot him in the ankle as he was running away to enable the police to apprehend him. Plaintiff was convicted in the Court of Common Pleas of Erie County of unlawful restraint, burglary, aggravated assault, resisting arrest and reckless endangerment.

Plaintiff brings four causes of action in his civil rights complaint: (1) a due process violation for use of excessive force during his arrest; (2) a due process violation for failing to provide necessary medical treatment after his arrest; (3) a Fourth Amendment violation for using perjured testimony, and the charge of aggravated assault, in order to obtain a conviction; and (40 violations of the First, Fourth and Eighth Amendments for conspiring with the Erie Daily Times to print, among other things, the charges against him prior to conviction.

Appendix A

COUNTS I and II

The first and third causes of action may be reviewed together as they are both governed by the Supreme Court ruling in Heck v. Humphrey, _____ U.S. _____, 114 S.Ct. 2364 (1994). Because Plaintiff's claims in these counts are based upon the legality of the underlying conviction, no civil rights claim has accrued as to them. Id. Therefore, these counts must be dismissed as not stating claims upon which relief may be granted.

In Heck, the Supreme Court held that there is no section 1983 claim for an "allegedly unconstitutional conviction or imprisonment, or for other harm cause by actions whose unlawfulness would render a conviction or sentence invalid" until that underlying conviction or sentence has been "reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." Heck, 114 S.Ct. at 2364, 2372.

Therefore, when confronted with a civil rights claim challenging the events leading up to a conviction, this Court must first decide "whether judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence." Id. at 2372. if not, the case may proceed. If so, the case must be dismissed "unless the plaintiff can show

that the conviction or sentence has already been invalidated." Id.

With regard to direct allegations of unconstitutional convictions, the Supreme Court reasoned that such claims were analogous to the tort of malicious prosecution, which requires a showing that a prior criminal proceeding has been terminated in favor of the accused for recovery. Id. at 2373. As to the "other harm" referred to by the Court, it gives the following example:

> "An example of this latter category--a § 1983 action that does not seek damages directly attributable to conviction or confinement but whose successful prosecution would necessarily imply that the plaintiff's criminal conviction was wrongful--would be the following: A state defendant is convicted of and sentences for the crime of resisting arrest....He then brings a § 1983 action against the arresting officer, seeking damages for violation of his Fourth Amendment right to be free from unreasonable seizures. In order to prevail in this § 1983 action, he would have to negate an element of the offense of which he has been convicted....[T]he § 1983 action will not lie."

Id. at n.6. Plaintiff's claims in his first and third causes of action fit squarely within this Supreme Court ruling.

Plaintiff's first cause of action is a due process claim for use of excessive force in his arrest. Because he was convicted of the crime of resisting arrest in state court, his claim here is precisely that described by the Supreme Court in the quoted material above as one that will not lie until the underlying conviction is reversed or called into question. This claim, having not accrued, must be dismissed.

Likewise, Plaintiff's third cause of action does not survive a Heck analysis. in that count, Plaintiff claims that his constitutional rights were violated because (1) perjured testimony was used to obtain the conviction against him, and (2) stories were fabricated to bring an aggravated assault charge against him in order to "cover" for the excessive force used at the time of his arrest. These allegations strike directly at the underlying convictions, which have not been reversed on appeal or called into question in any way by the state courts.

The Supreme Court's decision in Heck affects only plaintiff's request for damages on these two counts. Nonetheless, insofar as Plaintiff seeks injunctive or declaratory relief based on these claims, the action is properly construed as a habeas corpus petition, which requires

that plaintiff exhaust his state remedies.

Count II

Plaintiff claims in his second cause of action that Defendants failed or refused to provide necessary medical treatment to him following his arrest. Because there had been no formal; adjudication of guilt at the time of the required medical care, the eighth amendment to the United States Constitution has no application. The Due Process Clause, however, does require the responsible government agency to provide medical care to persons, such as Plaintiff, who have been injured while being apprehended by police.

The Supreme Court has stated that these due process rights "are at least as great as the Eighth Amendment protections available to a convicted prisoner." City of Revere v. Massachusetts General Hospital, 463 U.S. 239, 244 (1983). In this Circuit, a pretrial detainee must demonstrate that a defendant showed deliberate indifference to his serious medical needs. Boring v. Kozakiewicz, 833 F.2d 468 (3d Cir. 1987), cert. denied, 485 U.S. 991 (1988).

A serious medical need is "one that has been diagnosed by a physician as requiring treatment or one that is so obvious that a lay person would easily recognize the necessity for a doctor's attention." Monmouth County Correction

institute inmates v. Lanzaro, 834 F.2d 326, 347 (3d Cir. 1987), cert. denied, 486 U.S. 1006 (1988). A serious medical need may also be found to exist where the denial or delay of treatment results in "unnecessary and wanton infliction of pain." Id. at 347.

As to what constitutes deliberate indifference, a denial of a reasonable request for medical treatment, and intentional refusal to provide known needed medical care, and a purposeful delay in providing this care have all been held to constitute deliberate indifference. Id. at 346.

In certain allegations of Plaintiff's original complaint, which are incorporated by reference in his amended complaint, he alleges that he was shot by defendant Williams and beaten. He alleges that he was then taken to the police station and interrogated, and that after "prolonged interrogation,' he was taken to Saint Vincent Health Center for medical treatment. Although he makes no specific allegation of injury due to a delay in receiving medical treatment, he complains that a number of items that caused him distress resulted from "the incident that occurred on November 25th, 1992." These complaints range from high blood pressure, sleeplessness and nervousness to stress attacks and rapid pulse; but, the only complaint listed that could possible be connected to any delay in the delivery of

medical treatment is his claim of a "swollen ankle."

In his amended complaint, Plaintiff again alleges that he was shot by Defendant Williams, but here he adds that he was beaten on the head and back of the legs with clubs by the police. He complains that he suffered unspecified physical injuries and mental anguish. He makes no other specific allegations regarding his medical treatment.

These allegations sufficiently state a serious medical need in that a lay person could identify that a gun shot wound should be treated by a medical professional. However, no stretch of these claims, reviewing the allegations in Plaintiff's favor and with the understanding that he is before this Court pro se, alleges a constitutional injury because of a delay in providing medical care:

> "To establish a constitutional violation, the indifference must be deliberate and the actions intentional. Moreover, not every injury or illness invokes the constitutional protection -- only those that are "serious" have that effect."

Hampton v. Holmesburg Prison Officials, 546 F.2d 1077, 1081 (3d Cir. 1976). Plaintiff makes no allegations of a

serious injury due specifically to the fact that medical care was delayed, and no allegation that Defendants intentionally ignored his medical needs. In fact, Plaintiff's allegation of a "prolonged interrogation" may not even be adequate to state a claim of delay. See, e.g., Brawley v. Philadelphia Sheriff's Department, No. 87-6725, slip op. (E.D.Pa. December 22, 1988), aff'd 872 F.2d 411 (3d Cir. 1989) (no constitutional violation when pretrial detainee waited nearly 12 hours for medical care).

Plaintiff's allegations do not state a claim under the civil rights law for the violation of his due process rights for depriving or delaying medical treatment, and should be dismissed.

Count IV

In his fourth cause of action, Plaintiff alleges that the Defendants conspired with the Erie Daily Times to print incorrect facts regarding his case before due process of law was given. This does not state a claim under the civil rights law as no constitutional or federal law violation may be made out by these allegations, even if they are proven true at trial.

Finally, Defendants make an argument for dismissal of the complaint as to the Erie Police Department, claiming that it cannot be sued directly. Because of the recommended disposition of the counts of

the complaint discussed above, this argument need not be address by the Court.

In accordance with the Magistrates Act, 28 U.S.C. §636(b((1) (B) and (C), and Rule 72.1.4(B) of the Local Rules for Magistrates, the parties are allowed ten (10) days from the date of service to file objections to the report and recommendation.

/S/Susan Paradise Baxter
SUSAN PARADISE BAXTER
United States Magistrate Judge

Dated: August 24, 1995

APPENDIX B -- ORDER OF THE DISTRICT COURT DATED AUGUST 24, 1995

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DARRYL BYRD, Plaintiff	:	
v.	:	
ERIE CITY POLICE DEPARTMENT, Defendants	:	Civil Action No. 93-152 Erie

ORDER

AND NOW, this 24th day of August, 1995, upon consideration of Plaintiff's Motion for an Order Compelling Discovery (Doc. #21) and Defendants' response thereto, and in light of the Magistrate Judge's Report and Recommendation filed this date, it is hereby

ORDERED that Plaintiff's motion is **DENIED**, without prejudice.

/S/Susan Paradise Baxter
SUSAN PARADISE BAXTER
United States Magistrate Judge

cc: all parties of record (lw)

APPENDIX C -- MEMORANDUM ORDER OF THE DISTRICT COURT DATED SEPTEMBER 28, 1995

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DARRYL BYRD,	:	
Plaintiff	:	
v.	:	**C.A. No. 93-152 Erie**
	:	
ERIE POLICE DEPARTMENT, et al,	:	
Defendants	:	

MEMORANDUM ORDER

Plaintiff's civil rights complaint was received by the Clerk of Court on April 30, 1993, and was referred to United States Magistrate Judge Susan Paradise Baxter for report and recommendation in accordance with the Magistrates Act, 28 U.S.C. §636(b)(1), and Rules 72.1.3 and 72.1.4 of the Local Rules for Magistrates.

The magistrate judge's report and recommendation, filed on August 24, 1995, recommended that judgment on the pleadings be granted for Defendants. The parties were allowed ten (10) days from the date of service to file objections. An extension of time to file objections was granted to Plaintiff. Service was made on Plaintiff by delivery to SCI Rockview, where he is incarcerated, and on Defendants. No objections were filed. After de novo review of the pleadings and

documents in the case, together with the report and recommendation, the following order is entered:

AND NOW, this 28th day of September, 1995; **IT IS HEREBY ORDERED** that Defendant's Motion for judgment on the Pleadings is **GRANTED**. Judgment is entered in favor of Defendants and against Plaintiff.

The report and recommendation of Magistrate Judge Susan Paradise Baxter, dated August 24, 1995, is adopted as the opinion of the Court.

/S/Maurice B. Cohill, Jr.
MAURICE B. COHILL, JR.
United States Dist. Judge

cc: Susan Paradise Baxter
U.S. Magistrate Judge

all parties of record /s/ rw

APPENDIX D -- ORDER OF THE DISTRICT COURT DATED APRIL 16, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DARRYL BYRD,	:	
Plaintiff	:	
	:	
v.	:	**C.A. No. 93-152E**
	:	
CITY OF ERIE POLICE	:	
DEPT., et al.,	:	
Defendants	:	

ORDER

AND NOW, to-wit, this 16th day of April, 1996, this Court having received petitioner Darryl Byrd's Motion for Stay of Judgment (Doc. 39) requesting that we review his objections to the magistrate judge's report and recommendation in this action, it is hereby **ORDERED**, **ADJUDGED**, and **DECREED** that said motion be and hereby is **GRANTED**.

Appendix D

Upon consideration of petitioner's objections IT IS FURTHER ORDERED that our Order dated September 28, 1995 (doc. 37), adopting the report and recommendations of the magistrate judge, shall stand.

/S/Maurice B. Cohill, Jr.
Maurice B. Cohill, Jr.
District Judge

cc: Counsel of Record

Darryl Byrd
SCI Rockview
Box A
Bellefonte, PA 16823

APPENDIX E -- OPINION OF THE COURT OF THE UNITED STATES COURT OF APPEALS FILED FEBRUARY 13, 1998

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 96-3306 AND 96-3633

DARRYL BYRD
Appellant

v.

CITY OF ERIE POLICE DEPT;
R.E. WILLIAMS, Police Officer

On Appeal From the United States District Court For the Western District of Pennsylvania (D.C. Civil Action No. 93-CV-00152E) District Judge: Honorable Maurice B. Cohill, Jr.

Submitted Pursuant to Third Circuit LAR 34.1(a) December 1, 1997

BEFORE: STAPLETON, COWEN and LEWIS, Circuit Judges

(Opinion Filed February 13, 1998)

OPINION OF THE COURT

Appendix E

STAPLETON, Circuit Judge:

Appellant Darryl Byrd was convicted of unlawful restraint, burglary, aggravated assault, resisting arrest and reckless endangerment. He subsequently filed this civil rights case in which he alleged that the Erie Police Department shot him in the ankle without provocation and then beat him.[1] Byrd advance claims for excessive force, failure to provide necessary post-arrest medical treatment, use of perjured testimony to obtain a conviction, and an unconstitutional conspiracy between the police and an Erie newspaper to publish the charges against him prior to his conviction.

Defendants moved for judgment on the pleadings, which the magistrate judge recommended granting. Byrd, who was and is currently incarcerated, sought and received an extension of time until September 26, 1995, to file objections to the Report. When he did not file timely objections, the district court granted the motion for judgment on the pleadings by order entered September 29, 1995. Byrd's objections were received the next day.

On October 10, 1995, the district court received Byrd's motion for "stay of

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[1] Defendants contend that Byrd was fleeing the scene of a robbery and rape and that he had escaped from the police moments earlier.

judgment." By order entered April 18, 1996, the district court granted the motion for stay of judgment, denied Byrd's objections, and stood by its previous order granting defendants' motion for judgment on the pleadings. Byrd filed a notice of appeal on May 17, 1996. Appellees have filed a motion to dismiss the appeal as untimely.

I.

Byrd's motion to stay the judgment is properly considered as a motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b), or as a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e). Because it was filed within ten days of the entry of the order granting judgment on the pleadings, it tolled the time period for taking the appeal. Fed. R. App. P. 4(a)(4)(E) and (F). Counting from the date of entry of the order denying this post-judgment motion, Byrd's notice of appeal was filed on the 29th day, May 17, 1996, and is therefore timely. Fed. R. App. P. 4(a)(1).

II. The Excessive Force Claim

The magistrate judge found that Heck v. Humphrey, 512 U.S. 477, 114 S. Ct. 2364 (1994), disposed of Byrd's excessive force and perjured testimony claims. In Heck, the Supreme Court held that "a §1983 cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or

sentence has been invalidated." 512 U.S. at 489-90. A district court must dismiss such an action where a successful judgment under §1983 would "necessarily imply the invalidity of [the] conviction." Id. at 487. The magistrate judge found that Byrd's claims regarding his apprehension and arrest attacked actions whose unlawfulness would necessarily render his convictions invalid. This conclusion is inconsistent with our subsequent decision in Nelson v. Jashurek, 109 F.3d 142 (3d Cir. 1997). Accordingly, the judgment of the district court must be reversed and this case must be remanded to the district court for further proceedings on the excessive force claim consistent with our decision in that case.

III.

We agree with the district court that Byrd's perjured testimony claim is barred by Heck.

IV.

The district court dismissed Byrd's conspiracy claim on the ground that it failed to state a claim under federal law. We agree.

V.

Byrd alleges that, after being shot in the ankle and beaten on the head with clubs, he was taken to the police station and subjected to "prolonged interrogation"

before being taken to the hospital for medical treatment. The district court acknowledged that Byrd's "allegations sufficiently state a serious medical need in that a lay person could identify that a gun shot wound should be treated by a medical professional." It nevertheless dismissed this claim because Byrd "makes no allegation of a serious injury due specifically to the fact that medical care was delayed, and no allegation that Defendants intentionally ignored his medical need."

Assuming, as we must for present purposes, that truth of the allegations that Byrd had a gun shot wound and that the interrogation was prolonged, we cannot say Byrd will be unable to prove a set of facts consistent with his complaint on which relief could be granted. Conly v. Gibson, 355 U.S. 41, 45-46 (1957). There was a serious medical need of which a lay person would necessarily have been aware and if there was a prolonged delay in meeting that need for the purpose of interrogation, we believe a fact finder could infer deliberate indifference.[2]

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[2] The seriousness of any injury specifically attributable to the delay in receiving medical attention will be relevant to the amount of damage to which Byrd may be entitled, but the absence of an allegation of serious injury from the delay is not fatal in a Rule 12(b)(6) context.

VI.

The judgment of the district court will be reversed, and this case will be remanded for further proceedings consistent with this opinion.

TO THE CLERK:

Please file the foregoing not-for-publication opinion.

/S/ Judge Stapleton
Circuit Judge

APPENDIX F -- JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT ENTERED FEBRUARY 13, 1998

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 96-3306 & 96-3633

DARRYL BYRD,
Appellant

v.

CITY OF ERIE POLICE DEPT;
R.E. WILLIAMS, Police Officer

Appeal from the United States District Court for the Western District of Pennsylvania
D.C. No.: 93-cv-00152E
District Judge:
The Honorable Maurice B. Cohill, Jr.

Before: Stapleton, Cowen and Lewis,
Circuit Judges

JUDGMENT

Appendix F

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was submitted pursuant to Third Cir. LAR 34.1(a) December 1, 1998.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered April 16, 1996 and October 10, 1996, be, and the same are hereby reversed and the cause remanded to the said district court for further proceedings consistent with the opinion of this Court. Costs taxed against the appellees. All of the above in accordance with the opinion of this Court.

ATTEST: /S/ P. Douglas Sisk
Clerk

Dated: Feb. 13. 1998

APPENDIX G -- SUR PETITION FOR REHEARING DATED MARCH 31, 1998

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 96-3306 and 96-3633

DARRYL BYRD
Appellant

v.

CITY OF ERIE POLICE DEPT.;
R.E. WILLIAMS, Police Officer

SUR PETITION FOR REHEARING

BEFORE: BECKER, Chief Judge, SLOVITER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, McKEE, and RENDELL, Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,
/S/ Judge Stapleton
Circuit Judge

DATED: March 31, 1998